**SUHERI IBRAHIM** A

**v.**

**PP**

COURT OF APPEAL, PUTRAJAYA B
AHMAD MAAROP JCA
CLEMENT SKINNER JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: W-05-291-2009]
30 JULY 2012 C

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B - Trafficking in 879 grams of cannabis - Conviction and sentence - Appeal against - Drugs found concealed in front part of appellant's trousers - Whether appellant in "possession" of drugs - Whether appellant merely an innocent carrier - Whether judge carried out maximum evaluation of evidence - Whether conviction of appellant safe* D

The appellant was charged with trafficking in cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act. Briefly, upon receiving information about drug related activities at Jalan Datuk Keramat, Kuala Lumpur, a team of policemen had taken up position to keep the area under surveillance. The appellant, who was seen walking along the road, was stopped by SP3 and another policeman. When the appellant tried to run away, he was caught by PW6, who then conducted a body search on the appellant and found a packet of compressed leaves wrapped in aluminium foil and plastic wrapping hidden inside the front of the appellant's trousers in the region of the appellant's navel. The packages and its contents were confirmed to be cannabis, weighing 879 grams. The High Court made an affirmative finding that the appellant was in possession of the package at the time of his arrest and that the appellant knew that the package contained prohibited drugs. Thus, the High Court found the appellant guilty of the said offence, convicted him and sentenced him to death. The appellant appealed against the said decision. The central issue that arose was whether the appellant was found in "possession" of the cannabis stated in the charge. The appellant argued (i) that it would not have been physically possible to conceal a package measuring 1 inch in thickness and 9 inches in length in the front E F G H I

A part of a pair of close fitting trousers; (ii) if the learned judge had properly appreciated the evidence before the court, she would have noticed that no finger-prints were found on the package and (iii) the prosecution had only proved that the appellant was an innocent carrier of the package.

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**Held (dismissing the appellant's appeal; confirming conviction and sentence)**
**Per Clement Skinner JCA delivering the judgment of the court:**

C **(1)** Based on the evidence before the court, the learned judge had arrived at a finding of fact that the package of drugs was found concealed on the appellant. It had not been demonstrated that such finding was against the weight of evidence or perverse in any way. The learned judge was fully D aware of the arguments made about the size of the package and that no measurements had been taken of the appellant's waist size, but having considered these factors she still arrived at the finding which she did. The arguments made about the close fitting trousers worn by the appellant did not detract in E any way from the fact that the human body is not rigid and neither was the package in question solid or rigid. Therefore, the prosecution's evidence that the package was found concealed in the front part of the appellant's trousers was not an inherently improbable one. The learned judge was not F wrong in coming to her finding. (paras 14)

**(2)** The finding of the package concealed on the appellant's body was more consistent with the prosecution's witnesses' narration of the events that unfolded on the night in question G *ie*, that the appellant was confronted while he was walking along the street and immediately searched after he was apprehended while trying to flee. This was to be contrasted with the appellant's story that the package was found lying on the road because that was where it fell when one Malay man H in a Proton Saga had tried unsuccessfully to hand the package over to the appellant on his being arrested. The appellant's story was worthy of very little weight as his version was not tested by being put to PW3, PW6 and PW7 but was instead only revealed during the defence case. (para 14)

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**(3)** There was no substance or justification in the appellant's complaint that the learned judge failed to carry out a maximum evaluation of the evidence or to judicially appreciate the evidence before her. Further, the fact that the appellant's finger prints were not found on the package did not raise a reasonable doubt in the prosecution case in view of the fact that there was other cogent evidence from PW3 and PW6 that the package was found concealed on the appellant's body. (para 15 & 16)

**(4)** The proved facts showed that when recovered, the contents of the package was wrapped in aluminium foil and plastic wrapping. Therefore, the contents of the package were not visible from the outside. The fact that the package was found hidden in the front of the appellant's trousers indicated that he was trying to conceal what he was carrying. There was no reason for the appellant to want to hide the package he was carrying because its contents were not visible from the outside. The proper inference to be drawn from his having done so was that he wanted to avoid detection of the package as he knew something about the contents of the package which another person looking at the package would not know, namely that it contained prohibited drugs. Hence, the appellant's act of concealing the package in his trousers. He was accordingly not an innocent carrier. The conviction of the appellant was therefore safe. (paras 17 & 18)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu dituduh dengan pertuduhan pengedaran kanabis, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama. Secara ringkas, apabila menerima maklumat aktiviti berkaitan dadah di Jalan Datuk Keramat, Kuala Lumpur, satu pasukan polis telah mengambil tindakan untuk mengawasi kawasan tersebut. Perayu, yang dilihat berjalan di sepanjang jalan itu, telah dihentikan oleh SP3 dan seorang lagi pegawai polis. Apabila perayu cuba melarikan diri, perayu telah ditangkap oleh PW6, yang terus menjalankan pemeriksaan badan ke atas perayu dan menjumpai satu bungkusan daun mampat dibaluti dengan foil aluminium dan pembalut plastik yang tersembunyi di bahagian depan seluar perayu di rantau pusat perayu. Bungkusan dan kandungan-kandungannya telah disahkan

A sebagai kanabis, yang beratnya adalah 879 gram. Mahkamah Tinggi membuat dapatan afirmatif bahawa perayu mempunyai milikan ke atas bungkusan tersebut semasa perayu ditangkap dan perayu sedar bungkusan itu mengandungi dadah-dadah terlarang. Oleh itu, Mahkamah Tinggi mendapati bahawa perayu bersalah,
B menyabitkannya dan menjatuhkan hukuman mati. Perayu merayu terhadap keputusan tersebut. Isu utama yang timbul adalah sama ada perayu didapati mempunyai "milikan" ke atas kanabis yang dinyatakan di dalam pertuduhan. Perayu berhujah (i) bungkusan yang ukurannya 1 inci dari segi ketebalan dan 9 inci dari segi
C kepanjangannya tidak mungkin boleh disembunyikan di bahagian depan seluar yang ketat; (ii) jika yang arif hakim telah menilai keterangan di hadapan mahkamah dengan teliti, yang arif hakim akan mendapati bahawa tiada kesan cap jari ditemui di mana-mana bahagian bungkusan itu; dan (iii) pihak pendakwaan hanya dapat
D membuktikan bahawa perayu adalah pembawa tidak bersalah.

**Diputuskan (menolak rayuan perayu; mengesahkan sabitan dan hukuman)**

**Oleh Clement Skinner HMR menyampaikan penghakiman**
E **mahkamah:**

**(1)** Berdasarkan keterangan di hadapan mahkamah, yang arif hakim telah membuat dapatan fakta bahawa bungkusan dadah-dadah telah dijumpai tersembunyi di badan perayu. Ia tidak
F ditunjukkan bahawa dapatan itu adalah bertentangan dengan berat keterangan ataupun bertentangan dalam apa jua cara. Yang arif hakim menyedari sepenuhnya hujahan-hujahan yang dibuat berkenaan dengan saiz bungkusan dan bahawa tiada ukuran dibuat ke atas saiz pinggang perayu, tetapi setelah
G mempertimbangkan faktor-faktor ini, yang arif hakim tetap membuat dapatan yang dibuatnya. Hujahan-hujahan yang dibuat mengenai seluar ketat yang dipakai oleh perayu tidak mengalihkan dengan apa jua cara pun daripada fakta bahawa tubuh manusia tidak tegar dan bungkusan yang dipersoalkan itu
H pun tidak mampat atau tegar. Oleh itu, keterangan pihak pendakwaan bahawa bungkusan yang dijumpai tersembunyi di bahagian depan seluar perayu sememangnya bukan mustahil. Yang arif hakim tidak khilaf apabila membuat dapatan ini.

**(2)** Penemuan bungkusan yang disembunyikan di tubuh badan
I perayu adalah lebih konsisten dengan narasi peristiwa yang telah diberikan oleh saksi-saksi pihak pendakwaan berkenaan

malam kejadian, iaitu, perayu telah diberhentikan semasa berjalan dan terus diperiksa selepas ditangkap semasa cuba melarikan diri. Ini adalah berbeza dengan pembelaan perayu bahawa bungkusan tersebut telah dijumpai di atas jalan raya kerana di situlah ia terjatuh apabila seorang lelaki Melayu di dalam sebuah kereta Proton Saga telah mencuba tetapi tidak berjaya memberikan bungkusan kepada perayu apabila perayu ditahan. Apa yang diceritakan perayu tidak boleh dipercayai kerana versinya tidak diperiksa atau dikemukakan kepada PW3, PW6 dan PW7 tetapi hanya didedahkan semasa kes pembelaan.

**(3)** Tiada bahan atau justifikasi di dalam aduan perayu bahawa yang arif hakim gagal menjalankan penilaian maksimum keterangan atau menghargai keterangan di hadapannya. Seterusnya, fakta bahawa kesan cap jari perayu tidak ditemui atas bungkusan tidak menimbulkan keraguan munasabah ke atas kes pendakwaan kerana terdapat keterangan lain yang meyakinkan daripada PW3 dan PW6 bahawa bungkusan itu dijumpai tersembunyi atas tubuh badan perayu.

**(4)** Fakta-fakta yang telah dibuktikan menunjukkan bahawa apabila dijumpai, kandungan-kandungan bungkusan dibaluti foil aluminium dan balutan plastik. Oleh itu, kandungan-kandungan bungkusan tidak dapat dilihat dari luar. Fakta bahawa bungkusan itu dijumpai tersembunyi di bahagian depan seluar perayu menunjukkan bahawa perayu telah cuba menyembunyikan apa yang berada di dalam genggaman perayu. Tiada alasan bagi perayu untuk mahu menyembunyikan apa yang perayu sedang bawa sebab kandungan-kandungan tidak dapat dilihat dari luar. Inferens yang boleh dibuat adalah perayu ingin mengelakkan pengesanan bungkusan itu kerana perayu tahu sesuatu tentang kandungan bungkusan tersebut yang tidak akan diketahui orang lain jika melihat bungkusan itu, iaitu bahawa ia mengandungi dadah terlarang. Oleh itu, tindakan perayu menyembunyikan bungkusan di dalam seluarnya. Perayu bukanlah pembawa yang tidak bersalah. Sabitan perayu adalah selamat.

**Legislation referred to:**
Dangerous Drugs Act 1952, ss. 37(da)(vi), 39B(1)(a), (2)

*For the appellant - Mohd Firuz Jaffril; T/n Firuz Jaffril, Aidil & Zarina Advocs*
*For the respondent - Jamil Aripin; DPP*

*[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-69-2005]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

### Clement Skinner JCA:

**[1]** Suheri bin Ibrahim ('the appellant') was charged with trafficking in 879 grams of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, and punishable under s. 39B(2) of the same Act. On 6 October 2009 the High Court, Kuala Lumpur found him guilty of the offence, convicted him, and sentenced him to death. He appealed against that decision. We dismissed his appeal. These are our reasons for doing so.

### The Facts

**[2]** On 22 March 2005, upon receiving information about drug related activities at Jalan Datuk Keramat, Kuala Lumpur, ASP Haslah binti Bachok (PW3) went there together with seven other policemen and took up position to keep the area under surveillance. Det Sgt Maj Rahim bin Sulaiman (PW6) was in the police team. The police team arrived there at about 8pm. About 45 minutes later PW3 observed a person (later identified as the appellant) who was alone, slowly walking along the road looking left and right. There was nothing in the appellant's hands. SP3 and another policeman then stopped the appellant and identified herself as a policewoman and showed him her warrant card. The appellant was surprised and tried to run away but was caught by PW6 and another policeman. PW6 then conducted a body search on the appellant and found a packet of compressed leaves wrapped in aluminium foil and plastic wrapping hidden inside the front of the appellant's trousers in the region of the appellant's navel. The appellant and the package (exh. P10) were then taken to the police station. The package and its contents (exh. P10)

was sent to the Chemistry Department for analysis and the contents were confirmed (by the chemist Puan Maimonah Bte Sulaiman (PW2)) to be cannabis, weighing 879 grams.

## A *Prima Facie* Case

**[3]** On the basis of the evidence mentioned above, the learned High Court Judge made an affirmative finding that the appellant was in possession of the package at the time of his arrest and that the appellant knew that the package contained prohibited drugs. As the weight of the cannabis was over 200 grams, the learned judge invoked the presumption under s. 37(da)(vi) to presume that the appellant was trafficking in the drug. Accordingly the learned High Court Judge found a *prima facie* had been made out against the appellant in respect of the offence charged.

## The Defence

**[4]** On being called to make his defence, the appellant elected to give evidence an oath.

**[5]** The appellant's defence was that before his arrest, he worked by selling clothes at the market at Datuk Keramat, Kuala Lumpur and lived close by. On 22 March 2005, after he had finished work he was at home when he received a call from a friend called Adi who asked for a favour. Adi asked the appellant to collect Adi's 'barang' from a Malay man but did not tell the appellant what the 'barang' was. At first the appellant said he told Adi to collect the 'barang' himself, but since Adi said he was then outside the Keramat area and would come to the appellant's house to collect the 'barang' when he returned, the appellant agreed to do so. Adi then informed the appellant that when the Malay man arrived there, he (Adi) would phone the appellant to let him know. About 45 minutes later Adi phoned the appellant to say that the Malay man had arrived at Datuk Keramat in a white coloured Proton Saga and had parked his car at the roadside in the direction of Jelatek. The appellant said he went to meet the Malay man. On exiting Lorong 6 where he lived, the appellant said he noticed a white Proton Saga parked at the roadside. The car was parked facing Jelatek and there was a Malay man seated in the driver's seat of the car. On reaching the car the appellant said he noticed the car's engine was still running. The appellant then asked the person in the car if he was Adi's friend. When the person in the car said he was, the appellant

A informed him that he (the appellant) had been requested by Adi to collect the 'barang', whereupon the person in the car produced a red plastic bag with the 'barang' inside to handover to the appellant. According to the appellant, before he had a chance to even touch the 'barang' someone suddenly hugged him from
B behind saying "Polis", whereupon the Malay man in the Proton Saga sped off. The appellant said he did not receive the 'barang' which he saw lying on the road when he was arrested. The appellant said that when he was arrested even though he was surprised, he did not manage to run away. The appellant also
C denied that he had concealed the 'barang' in the front portion of his trousers at the area of his waist as he said he normally tucks his shirt into his trousers when he goes out and he wears fitting trousers. The appellant also maintained that he did not know what was in the package, until the police showed to him the contents
D of the package at the police station, for the first time.

**The High Court Decision**

**[6]** At the conclusion of the case the learned judge found that
E the appellant's defence had not raised a reasonable doubt on the prosecution's case, and neither had the appellant rebutted the presumption of trafficking on a balance of probabilities. In particular, the learned judge held that the appellant's story about being asked by Adi to collect a package from a Malay man in a
F white Proton Saga, was an afterthought because that story only surfaced during the defence case. The learned judge pointed out that during the prosecution's case, the name and story about Adi was not mentioned and neither was it put to the prosecution's witnesses that the Malay man in the Proton Saga was in the
G process of handing over the package to the appellant when he was arrested. The appellant was accordingly convicted of the offence charged and sentenced accordingly.

**[7]** To be fair to the learned judge, the matters that we have just mentioned were not the only matters which the learned judge
H considered when evaluating the defence of the appellant. In fact the learned judge had dealt with all the issues raised by learned defence counsel in the latter's submissions, but we have confined ourselves to these aspects of the appellant's case as they form the very core of his defence.

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## This Appeal

**[8]** Although there are some seven grounds of appeal set out in the appellant's petition of appeal, learned counsel for the appellant informed the court that they all relate in one way or the other to the central question of whether the appellant was found in "possession" of the cannabis stated in the charge ie, that he not only had physical custody and control over the package but he also knew what the package contained.

**[9]** It was the appellant's contention that the learned High Court Judge had erred in law and in fact when she held that the appellant was in possession of the package containing the drugs when he was arrested, as the learned judge had failed to carry out a maximum evaluation of the evidence before the court. The appellant complained that the learned judge had not tested the prosecution's evidence. According to the appellant, there was a lack of judicial appreciation of the evidence.

**[10]** In support of what he complained about above, the appellant drew attention to the following facts revealed by the evidence:

(a) According to PW3 and PW6, the package was found concealed in the front part of the trousers worn by the appellant;

(b) The photographs taken of the appellant soon after his arrest shows that he was wearing close fitting trousers;

(c) The package measured some 1 inch in thickness and 9 inches in length.

**[11]** According to the appellant in the light of these facts, it would not have been physically possible to conceal a package measuring some 1" x 9" in the front part of a close fitting trousers, as alleged by the prosecution's witnesses. The appellant further contended that if the learned judge had properly appreciated the evidence before the court, she would have noticed that (i) no finger-prints were found on the package; and (ii) the investigating officer had confirmed that no measurements were taken of the appellant's waist to compare it with the waist size of the trousers he was wearing. To reinforce the point he made, the

A appellant contended that if the package was found tucked into his trousers at the waist as alleged, then it would be reasonable to expect that a line would be left on the package but the photographs of the package indicate no such line was left on the package.

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**[12]** And to further demonstrate that a package of 1" x 9" could not be tucked into the front of a trousers as alleged, learned counsel for the appellant informed the court that before the hearing of this appeal he had used a book with the same C dimensions as the package but he could not tuck it into his trousers.

**[13]** Accordingly, it was the appellant's contention that had the learned judge properly directed herself she should have asked herself whether a package of that size could fit into the waist size D and trousers size of the appellant and she would have found that for the reasons he gave above, a reasonable doubt had been created whether the package was found concealed in the appellant's trousers as alleged. According to the appellant, at its very highest, the prosecution had only proved that he was an E innocent carrier of the package.

**[14]** We do not agree with the contentions of the appellant. Whether the package of drugs was found concealed in the front part of the appellant's trousers as the prosecution alleged, or F whether it was found lying on the road as the appellant alleged purely was a question of fact. The learned judge had, based on the evidence before the court, arrived at a finding of fact that the package of drugs was found concealed on the appellant. We find no reason to interfere with such a finding of fact. It has not been G demonstrated that such finding is against the weight of evidence or perverse in any way. In coming to her finding of fact the learned judge was fully aware of the arguments made about the size of the package and that no measurements had been taken of the appellant's waist size, but having considered these factors she H arrived at the finding which she did. We do not think the learned judge was wrong in coming to her finding. The arguments made about the size of the package and the close fitting trousers worn by the appellant as well as the fact that no line was seen in the photographs of the package do not detract in any way from the I fact that the human body is not rigid and neither was the package

in question solid or rigid. Conversely stated, both the human body and the package are flexible in nature. Therefore, the prosecution's evidence that the package was found concealed in the front part of the appellant's trousers is not an inherently improbable one. The learned judge found that PW3 and PW6 had not given inherently incredible evidence when they testified that on conducting a body search of the appellant they found the package concealed in his trousers. We find no error in the learned judge's acceptance of their testimony on the point. What PW3 and PW6 said about the package being found concealed in the appellant's trousers is also consistent with their evidence that they had kept the street under surveillance and had seen the appellant arrive there with nothing in his hands. Further, the finding of the package concealed on the appellant's body is more consistent with the prosecution's witnesses narration of the events that unfolded on the night in question ie, that the appellant was confronted while he was walking along the street and immediately searched after he was apprehended while trying to flee. This is to be contrasted with the appellant's story that the package was found lying on the road because that is where it fell when the Malay man in the Proton Saga tried unsuccessfully to hand it over to the appellant on his being arrested. In our judgment the appellant's story is worthy of very little weight as his version was not tested by being put to PW3, PW6 or PW7 but was instead held up his sleeves so to speak and only revealed during the defence case.

**[15]** We find no substance or justification in the appellant's complaint that the learned judge failed to carry out a maximum evaluation of the evidence or to judicially appreciate the evidence before her. In fact a reading of her judgment shows that just the opposite was the case.

**[16]** The fact that the appellant's finger prints were not found on the package do not in our view raise a reasonable doubt in the prosecution case in view of the fact that there is other cogent evidence from PW3 and PW6 that the package was found concealed on the appellant's body.

**[17]** With regard to the appellant's contention that at most he was an innocent carrier, we do not agree. The proved facts show that when recovered, the contents of the package was wrapped in aluminium foil and plastic wrapping. Therefore the contents of

A the package were not visible from the outside. The fact that the package was found hidden in the front of the appellant's trousers indicates that he was trying to conceal what he was carrying. Logically speaking, there was no reason for the appellant to want to hide the package he was carrying because its contents were
B not visible from the outside. The proper inference to be drawn from his having done so is that he wanted to avoid detection of the package he was carrying - he wanted to avoid detection of the package as he knew something about the contents of the package which another person looking at the package would not
C know, namely that it contained prohibited drugs - hence the appellant's act of concealing the package in his trousers. He was accordingly not an innocent carrier.

**[18]** We find the conviction of the appellant safe. We
D unanimously dismiss his appeal and confirm the conviction and sentence passed by the High Court.

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